STATE OF **WISCONSIN** **CIRCUIT COURT** **CHIPPEWA COUNTY**
BRANCH I

BRAD RIHN, d/b/a RIHN OIL,

Petitioner,

V. Case No. 91-CV-121

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

NOTICE OF ENTRY OF DECISION

To: Russell M. Lein
Attorney at Law
7500 West State Street, Suite 350
Wauwatosa, Wisconsin 53213

PLEASE TAKE NOTICE that a decision, of which a true and correct copy is hereto attached, was signed by the court on the 27th day of May, 1992, and duly entered in the Circuit Court for Chippewa County, Wisconsin, on the 27th day of May, 1992.

Dated this 29th day of May, 1992.

JAMES E. DOYLE

Attorney General

JENNIFER D. RYAN
Assistant Attorney General
State Bar No. 575780 GC

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
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STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

BRANCH I

BRAD RIHN, D/B/A RHIN OIL,

Petitioner,

vs. MEMORANDUM DECISION

91 CV 121

DEPARTMENT OF INDUSTRY,
LABOR & HUMAN RELATIONS,

Respondent.

Brad Rihn appeals a determination by the Department of Industry, Labor & Human Relations that he was grossly negligent in the maintenance of his petroleum product storage system. This finding made Rihn ineligible for cost reimbursement from the Petroleum Environmental Cleanup Fund. A review of the record shows that substantial evidence supports the factual findings by DILHR that Rihn was grossly negligent. Therefore, DILHR's decision is affirmed.

An appeal from an administrative agency is not a new trial, nor is the judge permitted to reassess the evidence and render a decision based on the weight and credibility he or she would give the evidence. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 048, 280 N.W. 142 (1979). Instead, the court must examine the record and determine whether substantial evidence exists supporting the findings made by the agency. This means even if substantial evidence existed in favor of a conclusion contrary to that made by DILHR, the decision must be upheld if substantial evidence also exists supporting that decision. Vocation. Tech. & Adult Ed. Dist. I3 v ILHR Dept., 76 Wis.2d 230, 251 N.W.2d 41 (1977). Thus, the court may not decide whether or not it agrees with the decision, but only whether or not the decision should be upheld. Only if a reasonable person, acting reasonably, could not have reached the same result from the evidence and its inferences, may the court set aside the agency's decision. Hamilton v. ILHR Dept., 94 Wis.2d 611, 288 N.W.2d 857 (1980).

In this case substantial evidence supports DILHR's finding of gross negligence, evidence to the contrary notwithstanding. Rihn cites evidence contrary to the decision. For purposes of an administrative appeal, evidence contrary to the decision will not change the result if substantial evidence exists supporting the decision. Documents in the record show repeated demands by the DNR and DILHR that Rihn comply with the law recording environmental hazards presented by Rihn Oil. Rihn made no written responses to these agencies. Furthermore, the documentary record shows that Rihn apparently did not comply with the-- request that he comply with the law. Compounding the problem was soil contamination at Rihn Oil caused by fuel oil spills and/or gasoline spills or leakage. The documentary record supports a finding that Rihn failed to take required action with respect to this contamination. One result of this failure was contamination run off onto a grade school playground. The documentary record does not show any affirmative action by Rihn to cooperate with state officials. Rihn's failure to take action to eliminate environmental hazards and arrange for cleanup of the site support a finding that he willfully and wantonly disregarded the rights of others to have clean soil and clean ground water.

Rihn contends that his lack of funds to clean up his site prevented him from taking, action. This apparently is true, but the record shows dilatory action by Rihn in doing the things necessary to obtain funding. Other than the testimony presented by Rihn and Ron McGill, the record permits a reasonable finding that Rihn made no real effort to prevent leaks or spills, and take required safety precautions at his site. Thus, the record permits a finding that Rihn's gross negligence existed regardless of the lack of funds for cleanup.

Rihn also argues that a statement by the hearing examiner led him to believe that it was unnecessary for him to present any additional testimony on points in dispute. Rihn argues that this denied him his right to cross examine witnesses and call additional witnesses. The hearing examiner made the following statement:

> As you and I discussed also, Mr. Rihn, we discussed other witnesses, who you should bring with you. I'll determine whether it would make a difference or whether it would be important to have direct testimony. To the greatest extent possible, I'm just going to assume that these people you mentioned would basically confirm what you're saying. . . . I think from what you're saying I can pretty much take that as given, and that the crucial points are more of the things you've been testifying to directly.

It is not clear from this statement exactly what Rihn might have understood the examiner to be saying. Rihn argues that this meant the hearing examiner would accept his and McGill's testimony as correct and assume that persons not testifying would have corroborated Rihn's and McGill's testimony had they been there to testify. A more reasonable reading is that the hearing examiner, recognizing that Rihn had appeared without counsel, wanted to explain to him how he would go about making a decision, and try not to hold Rihn's failure to call witnesses against him. The examiner's statement did not mean that he would disregard the written record before him. Rihn's argument that the examiner's statement meant he would accept Rihn's testimony as conclusive is not a reasonable conclusion.

Finally, Rihn argues that an ex parte communication by a DILHR employee unfairly affected the decision. To prevail on this issue, Rihn must prove prejudice by his inability to rebut the letter and that improper influence on the decision maker appears to have resulted. Dane County Hospital & Home v. LIRC, 125 Wis.2d 308, 371 N.W.2d 815 (Ct. App. 1985). Rihn has not met this burden. The letter essentially restates matters already of record, except for one item not related to maintenance and cleanup of the site involved in this proceeding. As to items related to the site, Rihn had an opportunity at a hearing to present evidence regarding these items. Rihn has not shown any prejudice.

For the reasons set forth above, the decision is affirmed.

Dated this 27th day of May, 1992.

BY THE COURT,

RODERICK A. CAMERON

CIRCUIT JUDGE

Tommy G. Thompson
Governor
Carol Skornicka
Secretary

Mailing Address:
201 E. Washington Avenue
Post Office Box 7946
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Telephone (608) 266-7552

State of Wisconsin

Department of Industry, Labor and Human Relations

February 25, 1991

TO: Parties Named Below

Re: In the matter of the petition for hearing of the Rihn Oil Go.

Enclosed is the department's final decision in this matter. Your right to petition for rehearing or for judicial review is as follows:

Judicial Review. Any person who is affected adversely by the enclosed decision is entitled to ask a state circuit court to review the decision. Any petition for judicial review must be served and filed within 30 days after the date that the decision was mailed. The petition for review must identify the Department of Industry, Labor and Human Relations as the respondent. (The full procedure for judicial review of agency decisions is contained in sections 227.52 to 227.57, Wis. Stats.)

Petition for Rehearing. A person who is affected adversely by the enclosed decision may file a petition for rehearing with this agency under certain conditions. The petition must be based on a material error of law, a material error of fact, or newly discovered evidence that could not have been obtained earlier. Any petition for rehearing must be filed with the Secretary of the Department of Industry, Labor and Human Relations (mailed to the address given above and marked "Attention: Howard Bernstein") within 20 days after the date the decision was mailed. (The full procedure for rehearing petitions is contained in sec. 227.49, Wis. Stats.)

Sincerely,

Howard I -Bernstein
General Counsel
(608) 266-9427

Enclosure

Parties: Mr. Brad Rihn
Rihn Oil Co.
104 Wells St.
Chippewa Falls, WI 54729

DILHR Division of Safety and Buildings
Miles Mickelson, Bureau of Petroleum
Inspection and Fire Protection
P.O. Box 7969, Madison, WI 53707

cc: M. Corry, R. Buchholz, W. Morrissey
Mr. Ron McGill, Box 312, New Auburn WI 54757

EC **792IR Ol.'),:**

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

In the Matter of the PECFA application of Rihn Oil Co.,

Petitioner.

FINAL DECISION

This is a review of a decision of the DILHR Division of Safety and Buildings, through its Bureau of Petroleum Inspection and Fire Protection. In a letter of August 4, 1990, to Mr. Brad Rihn, the Bureau stated that the petitioner Rihn Oil Co. was ineligible for an award under the state Petroleum Environmental Cleanup Fund Act (PECFA) under sec. 101.143(4)(g)3, Stats., because the petitioner had been "grossly negligent" in the maintenance of a petroleum product storage system.

At a hearing held on January 30, 1991, the petitioner appeared by Mr. Brad Rihn and Mr. Ron McGill. The Division of Safety and Buildings appeared by Mr. Miles Mickelson. Upon review, my conclusion is that the Bureau's decision was correct.

FINDINGS OF FACT

I. The petitioner Rihn Oil Company is owned and operated by Mr. Brad Rihn. The petitioner owned and operated a bulk fuel storage plant located on 13th Avenue in Bloomer, Wisconsin.

2. From 1988 to 1990 the petitioner received a series of notices from the state and local government requiring him to take action on issues related to compliance with safety and regulatory requirements:

January 29, 1988 - letter from Chief Rod Schmidt of the Bloomer Fire Department concerning code violations (Ind 8, Wis. Adm. Code).

May 30 , 1988 - letter from Chief Rod Schmidt concerning continued code violations and other violations not cited in the earlier letter. July 15, 1988 followup date established.

June 16, 1989 - notice of violation from DNR concerning oil spills at the Bloomer facility. Order to retain a consultant by July 17, 1989 to begin clean-up and initiate preventative measures.

August 1, 1989 - notice that DNR would proceed with soil samples because the petitioner had not notified DNR that any consultant had been hired.

October 30, 1989 - notice from DNR that test results on soil and water samples verify petroleum contamination. Petitioner is ordered to hire an experienced environmental consultant within five days ark to notify DNR. The notice requires that the consultant submit a work plan for conducting a remedial investigation within 30 days. The notice also specifically advises that future entitlement to PECFA assistance could be jeopardized by a failure to cooperate.

November 1, 1989 order from DILHR to test the underground storage tanks and associated piping at the Bloomer bulk plant for integrity and tightness.

November 15, 1989 - order from DILHR to empty all tanks and deactivate all systems at the bulk plant, due to concern over continuing environmental damage. This order was issued after a DILHR inspector found that petroleum product was on the ground and surface water at the plant site and that excavation and soil removal had taken place without notice to DNR or DILHR.

March 7, 1990 - findings of fact, conclusions of law and order issued by DILHR, based on the observation of a transfer of product into a bulk carrier transport at the facility on February 6, 1990. The transfer used an apparently improvised system involving a flexible hose and without fire protection equipment, a fueling rack, or other necessary equipment. Petroleum product was observed on the ground and on surface water draining towards a parochial school on the adjacent property. The order requires petitioner to cease all operations at the Bloomer facility, comply with all previous orders. act only under fire department or DILHR supervision, and comply with all DNR requirements.

March 8, 1990 - order issued by the DNR relating to runoff from the Bloomer facility onto neighboring property involving petroleum contaminated surface water and petroleum product. The order requires the construction of an earthen berm to prevent runoff, restriction of access to the excavation hole at the site, and cleanup of ponded oil and oil contaminated snow at the facility and at the adjacent school playground.

March 13, 1990 - notice of violation from DNR ordering immediate action to start cleanup at the facility.

July 24, 1990 - formal DNR order from the Director of the Office of Environmental Enforcement directs the petitioner to hire a qualified consultant with ten days to investigate and implement a cleanup plan.

3. At various times, acting on his own and without notifying DNR or DILHR, Mr. Rihn took a variety of "self-help" steps to deal with conditions at the site. This has resulted in the removal of the

tanks and buildings that were previously on the site. However, Mr. Rihn has continually failed to utilize a qualified consultant or a hydrogeologist and the site continues to present a significant contamination concern.

CONCLUSIONS OF LAW

I. The petitioner's repeated failure to comply with notices and orders from DNR, DILHR and the Bloomer Fire Department constituted gross negligence in the maintenance of its petroleum product storage system.

2. The Division of Safety and Buildings was correct in finding the petitioner to be ineligible for PECFA reimbursement on the basis of gross negligence in the maintenance of its petroleum product storage system at the Bloomer facility.

ORDER

The denial of PECFA eligibility stated in the letter of August 9, 1990 is affirmed.

OPINION

From the petitioner's point of view, efforts were made to comply with the notices from the various government agencies. However, according to Mr. Rihn's own statements at the hearing, he generally did not bother contacting any of the agencies either before or after any of the cleanup work that he did himself. It was gross negligence for the petitioner to take this casual approach after repeated notices concerning the need for the involvement of an experienced consultant.

Part of the purpose of the PECFA fund is the idea of a "no fault" approach to the cleanup of contaminated sites. Thus, the concept of an exclusion for gross negligence" requires that any disqualifying conduct be more extreme than "ordinary" negligence. Conduct which ignores repeated warnings and instructions from the regulatory agencies meets this standard.

Dated this 25th day of February 1991.

Howard I. Bernstein, General Counsel
Department of Industry, Labor and
Human Relations
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